

ORIGINAL
RECEIVED

JAN 25 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

)

)

CC Docket No. 96-45

Federal-State Joint Board on

)

Universal Service

)

REPLY COMMENTS OF NEXTEL COMMUNICATIONS, INC.

NEXTEL COMMUNICATIONS, INC.

Robert S. Foosaner
Lawrence R. Krevor
Laura L. Holloway
NEXTEL COMMUNICATIONS, INC.
1450 G Street, N.W.
Washington, D.C. 20005
202-296-8111

Leonard J. Kennedy
Laura H. Phillips
Kimberly L. Cook
DOW, LOHNES & ALBERTSON PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036
202-776-2000

Its Attorneys

January 25, 1999

No. of Copies rec'd 0+4
List ABCDE

SUMMARY

Nextel supports the Commission's efforts to simplify and improve the wireless universal service contribution process. Many carriers agree that a reasonable safe harbor methodology would provide a greater level of certainty to wireless providers as well as welcome predictability in calculating one aspect of wireless carrier contribution amounts. The safe harbor should not, however, be forced upon CMRS carriers; rather, it should be an option coequal with demonstrating the jurisdiction of relevant revenues via any reasonable means.

Given the various percentages advocated by many CMRS commenters, the Commission should consider whether a factor smaller than 15 percent is a better reflection of CMRS carriers' experiences prior to adopting any permanent safe harbor amount. Whatever the Commission decides to be the appropriate safe harbor percentage, carriers should not be forced to conduct expensive traffic studies to support an alternative jurisdictional determination. While traffic studies represent a possible proxy mechanism, wireless carriers must have the option of using any other reasonable means to determine their percentage of reportable interstate revenues. Rather than forcing on carriers a set of simplifying assumptions that could well cause additional expense and dislocation for carriers with differing internal data handling capabilities, the Commission should allow CMRS carriers opting out of the safe harbor to use their own simplifying assumptions, so long as they are identified and explained.

Nextel agrees with most commenters that there is no practical way for the Commission to prescribe a fixed amount of local usage for CMRS carriers to provide as part of a core set of telecommunications services. There are literally thousands of CMRS pricing plans offered nationwide and each represents a different value proposition to the end user customer. Instead,

the Commission should allow customers in high cost areas to select the eligible carriers that provide the range of services and pricing options best suited to their needs. Moreover, a requirement to match a landline telephone unlimited local usage option could foreclose many CMRS carriers from providing supported services in areas that could most benefit from landline-wireless competition.

A few commenters representing incumbent LECs suggest that the state public service commissions are better qualified to judge how much local usage should be supported by federal universal service funds. Any decision permitting the states to determine pricing for any CMRS service would be contrary to the Communications Act, Commission precedent and the Joint Board's prior determinations, which places responsibility with the Commission for determining local usage in a basic service package to be supported by federal universal service mechanisms.

TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| SUMMARY | i |
| I. INTRODUCTION | 1 |
| II. ADOPTION OF A REASONABLE SAFE HARBOR JURISDICTIONAL ALLOCATION METHODOLOGY WOULD PROVIDE GREATER CERTAINTY .. | 2 |
| III. THE COMMISSION SHOULD NOT ADOPT A LOCAL USAGE REQUIREMENT FOR WIRELESS BASIC SERVICE PACKAGES | 7 |
| IV. CONCLUSION | 10 |

RECEIVED

JAN 25 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
) CC Docket No. 96-45
Federal-State Joint Board on)
Universal Service)

REPLY COMMENTS OF NEXTEL COMMUNICATIONS, INC.

Nextel Communications, Inc. ("Nextel"), by its attorneys, hereby submits these reply comments in response to the many comments filed on the *Further Notice of Proposed Rulemaking* that address contributions by Commercial Mobile Radio Service ("CMRS") providers to the federal Universal Service Fund ("USF").^{1/} The comments support the Commission's efforts to adopt a jurisdictional allocation mechanism for wireless providers to use to assist in the determination of their federal universal service contribution amounts. Thus, the Commission should proceed to adopt a safe harbor mechanism that is simple to apply and that promotes a higher level of stability and certainty for CMRS carriers opting for its use.

I. INTRODUCTION

Nextel supports the Commission's efforts to simplify and improve the wireless universal service contribution process. Many carriers agree that a reasonable safe harbor methodology would provide a greater level of certainty to wireless providers as well as welcome predictability in calculating one aspect of wireless carrier contribution amounts. While some commenters

^{1/} See Federal-State Joint Board on Universal Service, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 96-45, FCC 98-278, rel. October 26, 1998 ("*Memorandum Opinion and Order*" and "*Further Notice*").

favor Commission endorsement of their own simplifying assumptions, a protracted proceeding would be required to determine whether any of the assumptions put forward are suitable for the wide range of CMRS carriers in operation today.

On the subject of CMRS carriers offering core universal services in high cost areas, the comments are nearly unanimous that there is no reason for the Commission to prescribe a fixed amount of local usage and no practical way to determine what it should be. Instead, the Commission should allow customers in high cost areas to select the eligible carriers that provide the range of services and pricing options best suited to their needs. The market is best able to determine the appropriate amount of local usage included in carrier pricing plans. Under no circumstances should the Commission allow the states to determine a minimum amount of local usage to be provided by eligible CMRS carriers.

II. ADOPTION OF A REASONABLE SAFE HARBOR JURISDICTIONAL ALLOCATION METHODOLOGY WOULD PROVIDE GREATER CERTAINTY.

The majority of commenters, like Nextel, supported the concept of a jurisdictional safe harbor.^{2/} Any safe harbor, including the interim safe harbor, must however, be applied only on a prospective basis. In the last year, wireless providers have not had guidance from the Commission on how to estimate interstate and intrastate telecommunications revenues. As

^{2/} See e.g., Comments of AirTouch Communications, Inc. ("AirTouch") at 2; Comments of Bell Atlantic at 3; Comments of Cellular Mobile Systems of St. Cloud and Leaco Rural Telephone Cooperative, Inc. ("St. Cloud") at 3; Comments of the Cellular Telecommunications Industry Association ("CTIA") at 3; Comments of Omnipoint Communications, Inc. ("Omnipoint") at 2; Comments of Personal Communications Industry Association ("PCIA") at 5; Comments of Sprint PCS at 4; and Comments of US West Communications, Inc. and US West Wireless, Inc. ("US West") at 1.

BellSouth indicated in its comments, there is no evidence to suggest that there have been reporting abuses.^{3/} Thus, a CMRS carrier's decision to use any safe harbor adopted by the Commission on a going-forward basis must not be misused by any party as a basis to question the good faith estimates made by CMRS carriers to date.

Many commenters correctly urged the Commission to adopt a reasonable permanent safe harbor allocation method that is straight-forward and easy to apply.^{4/} A critical caveat to this endorsement is that any adopted safe harbor be an option, with CMRS carriers free to opt out of the safe harbor if it proves to be too high or low for the carrier's markets.^{5/}

There is disagreement in the comments about what an appropriate interstate safe harbor percentage should be for broadband CMRS. For example, the Cellular Telecommunications Industry Association ("CTIA") suggests that the Commission adopt a safe harbor percentage of between five and six percent.^{6/} GTE suggests a safe harbor of between four and eight percent based on the industry average of reported interstate revenue.^{7/} Bell Atlantic argues that a 7.7 percent wireless safe harbor should be based on the average of interstate and intrastate revenues

^{3/} Comments of BellSouth Corporation at 7.

^{4/} Comments of PCIA at 6-7.

^{5/} See e.g., Comments of AirTouch at 2; Comments of AT&T Corp. at 3-4; Comments of Bell Atlantic at 4-5; Comments of St. Cloud at 4; Comments of CTIA at 3; MACTel at 3; Comments of Nextel Communications, Inc. at 7; Comments of Omnipoint at 4; Comments of PCIA at 7-8; Comments of SBC Communications, Inc. ("SBC") at 2; Comments of Sprint PCS at 5-6; and Comments of US West at 3.

^{6/} Comments of CTIA at 6-7.

^{7/} Comments of GTE at 6-9.

of all wireless carriers.^{8/} Sprint PCS urges the Commission to base its percentage on the mean or average of the Form 457 worksheet data that has been submitted to date.^{9/} These comments suggest that the Commission's proposed safe harbor percentage of 15 percent may be too high. Thus, the Commission should consider whether a factor smaller than 15 percent is a better reflection of CMRS carriers' experiences prior to adopting any permanent safe harbor amount.

Whatever the Commission decides to be the appropriate safe harbor percentage, carriers should not be forced to conduct expensive traffic studies if they opt out. As many commenters observed, even simplified traffic studies are expensive, complex, burdensome and imprecise.^{10/} As Nextel noted in its initial comments, the *Further Notice* assumes, without discussion, that a CMRS jurisdictional traffic study will yield data that can be directly translated into an allocation of telecommunications revenues. While this is likely true for landline technologies, it may not hold true for wireless. Thus, the Commission should be highly cautious in endorsing any type of traffic study as the *only* possible surrogate for direct reporting of wireless telecommunications revenues. Nextel's view is that the costly, time consuming and burdensome process of developing and testing assumptions to be applied either to periodic or episodic wireless traffic studies is not justified.^{11/}

^{8/} Comments of Bell Atlantic at 4.

^{9/} Comments of Sprint PCS at 5.

^{10/} See e.g., Comments of Sprint PCS at 3-4; Comments St. Cloud at 4.

^{11/} As Comcast's comments points out, even after considerable time and resources are spent on establishing simplifying assumptions, the new methodology would not lead to greater certainty for carriers and their customers. Comments of Comcast Cellular Communications, Inc. at 31.

Some commenters seek to have the Commission adopt their version of simplified assumptions that are suited to their particular network or their data collection systems.^{12/} Rather than forcing on carriers a set of simplifying assumptions that could well cause additional expense and dislocation for carriers with differing internal data collection capabilities, the Commission should allow CMRS carriers opting out of the safe harbor to use their own simplifying assumptions, so long as they are identified and explained.^{13/}

While traffic studies represent a possible proxy mechanism, wireless carriers must have the option of using any other reasonable means to determine their percentage of interstate revenues.^{14/} As AT&T notes, while there is a need for documentation to substantiate reported revenues, extensive verification procedures would essentially eliminate the ability of small and mid-sized wireless carriers with limited financial means to opt out of the safe harbor.^{15/} To prevent this from occurring, wireless carriers should not be required to obtain a waiver prior to using their own methodologies. As many commenters note, an onerous waiver requirement would force carriers to incur additional expenses and would create needless additional

^{12/} Comments of AirTouch at 4.

^{13/} Nextel agrees with PCIA that a wireless carrier should be permitted to use any reasonable mechanism to demonstrate its decision to report interstate revenues outside of the safe harbor. Comments of PCIA at 9.

^{14/} See Comments of US West at 4. See also, Comments of PCIA at 7-8 (arguing that if a wireless provider can determine its interstate end-user telecommunications revenues on the basis of its own books or other legitimate means, the wireless provider should be permitted to report outside of the safe harbor).

^{15/} Comments of AT&T Corp. at 4-5.

administrative burdens on carriers, the Commission and the Universal Service Administrator.^{16/} The Commission's present audit policy under the good faith estimate approach allows the USF Administrator to review the reasonableness of any carrier's chosen methodology. This ability to audit any "outlier" data should be continued and available to the Administrator under any opt-out of the safe harbor. There is no reason for the Commission to waste time and resources establishing "one size fits all" simplifying assumptions.

The Commission should not require wireless carriers to report on an MTA-by-MTA basis. Several commenters observed that requiring reporting and contribution on an MTA basis would be a waste of carriers' resources.^{17/} Indeed, the proposal to report on an MTA basis will not promote greater accuracy and could create additional confusion. It would also increase administrative costs of the USF program that inevitably will be passed to subscribers.

CTIA's suggestion to adopt a simplifying assumption of using MTAs as the geographic boundary for determining interstate and intrastate traffic, rather than state lines should not be adopted. As AirTouch pointed out in its comments, the use of MTAs as interstate boundaries promotes inaccuracies without significantly simplifying the reporting process and is not likely to be accepted as accurate by state commissions that assess carriers based on jurisdictional revenues.^{18/} The Commission should recognize that this would only further complicate the

^{16/} See Comments of Bell Atlantic at 5; Comments of AT&T Corp. at 5; Comments of MACTel Regarding Further Notice of Proposed Rulemaking at 3; Comments of PCIA at 8; and Comments of St. Cloud at 4.

^{17/} See Comments of Ameritech at 3; Comments of Omnipoint at 4; Comments of SBC Communications, Inc. at 5.

^{18/} Comments of AirTouch Communications, Inc. at 6-7.

revenue reporting process without providing any greater degree of certainty or predictability to CMRS carriers.^{19/}

III. THE COMMISSION SHOULD NOT ADOPT A LOCAL USAGE REQUIREMENT FOR WIRELESS BASIC SERVICE PACKAGES.

Section 254 of the Communications Act of 1934, as amended, specifies that only eligible telecommunications carriers ("ETCs") may receive federal universal service support.^{20/} In its *First Report and Order* implementing universal service, the Commission determined that ETCs should provide some specified minimum amount of local usage as part of the basic service package of supported services.^{21/} The *Further Notice* requested comment on "whether some amount of minimum local usage should be included in the basic service packages, and if so, how to determine that local usage requirement."^{22/} The Commission also inquired whether a minimum local usage requirement should be a pre-condition to receiving universal service funding.

^{19/} To further complicate matters, Rand McNally & Company argues that use of its proprietary MTA Listings as a boundary for classifying CMRS traffic as interstate or intrastate would infringe on Rand McNally's property right. Comments of Rand McNally & Company at 1.

^{20/} 47 U.S.C. § 254(e). *See also* 47 U.S.C. § 214 (e)(1)(A) (defining the responsibilities of an ETC).

^{21/} *See* Federal-State Joint Board on Universal Service, *First Report and Order*, 12 FCC Rcd 8776, 8813 (1997) ("*First Report and Order*").

^{22/} *Further Notice* at ¶ 50.

Numerous commenters urged the Commission not to determine a set amount of local usage for wireless carriers.^{23/} These parties correctly conclude that the diverse and dynamic nature of wireless service offerings would make it difficult, if not impossible, for the Commission to define a minimum amount of local usage that has been subscribed to by a majority of customers.^{24/}

Nextel agrees that there is no practical way for the Commission to prescribe a fixed amount of local usage from among the thousands of CMRS pricing plans offered nationwide.^{25/} As Bell Atlantic observed, some service packages include unlimited local calling within a local service area, some include a certain number of local calls of unlimited duration and others require payment for each call made by the customer.^{26/} To set the required amount of "local" usage, the Commission would need to define some amount of local usage that takes into account all of these variables.

The process of setting a fixed amount of "local" use in high cost geographic areas in a manner that ignores the particular value of CMRS could unnecessarily limit the options of rural

^{23/} See, e.g., Comments of AirTouch Communications, Inc. at 10; Comments of Ameritech at 5; Comments of Bell Atlantic at 6; Comments of Sprint PCS at 10-11; Comments of Western Wireless Corporation at 21; Comments of the United States Telephone Association ("USTA") at 3.

^{24/} See, e.g., Comments of Bell Atlantic at 6; Comments of Sprint PCS at 12-14.

^{25/} Comments of Bell Atlantic at 6.

^{26/} *Id.*

residents.^{27/} Requiring CMRS carriers to provide unlimited local usage plans may preclude some wireless providers from participating in the provision of universal service. Some wireless carriers that otherwise might have sought to become ETCs may not, thereby limiting consumer choices and harming the prospect of competition. The better course would be for the Commission to refrain from prescribing any particular amount of CMRS local usage and allow the marketplace to determine the appropriate amount of local usage.

A few commenters representing incumbent LECs suggest that the state public service commissions are better qualified to judge how much local usage should be supported by federal universal service funds.^{28/} That allocation of responsibility is not supported by law or the record. In fact, a decision permitting the states to determine pricing for any CMRS service would be contrary to the Communications Act, Commission precedent and the Joint Board's prior determinations.

Section 254 (a)(2) of the Act requires the Commission to establish rules implementing the recommendations of the Joint Board for universal service. It further specifies that the rules established by the Commission must include a definition of the services that are supported by federal universal service support mechanisms. This statutory language directly specifies that the responsibility for defining the services eligible for federal support rests solely with the Commission, not the states.

^{27/} *See* Comments of Sprint PCS at 12-14.

^{28/} *See* Comments of Ameritech at 5; Comments of USTA at 3.

The decisions implementing universal service support this view. In its *First Report and Order*, the Commission concluded that it is in the best position to determine the level of local usage to be supported by federal universal service mechanisms.^{29/} The Commission assumed responsibility for this determination at the urging of the Joint Board.^{30/} These decisions plainly place responsibility for determining local usage in a basic service package to be supported by federal universal service mechanisms with the Commission and not with the states.

IV. CONCLUSION

The record collected in this proceeding supports Commission action on a jurisdictional safe harbor. The safe harbor should not, however, be effectively forced upon CMRS carriers, rather it should be an option coequal with demonstrating the jurisdiction of relevant revenues via any reasonable means. One carrier's preferred simplifying assumptions may be unworkable for another. Thus, the Commission should not endorse any specific assumptions in this proceeding.

^{29/} *First Report and Order*, 12 FCC Rcd at 8812.

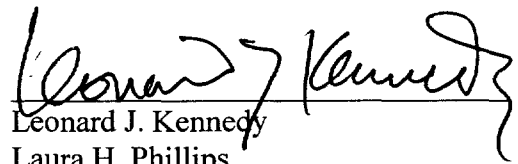
^{30/} *See Federal-State Joint Board on Universal Service, Recommended Decision*, 12 FCC Rcd 87, 113 (1996).

Finally, a requirement to match a landline telephone unlimited local usage option could foreclose many CMRS carriers from providing supported services in areas that could most benefit from landline-wireless competition.

Respectfully Submitted,

NEXTEL COMMUNICATIONS, INC.

Robert S. Foosaner
Lawrence R. Krevor
Laura L. Holloway
Nextel Communications, Inc
1450 G Street, N.W.
Washington, D.C. 20005
202-296-8111


Leonard J. Kennedy
Laura H. Phillips
Kimberly L. Cook
Dow, Lohnes & Albertson PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036
202-776-2000

Its Attorneys

January 25, 1999

CERTIFICATE OF SERVICE

I, Sherene F. Howerton, a secretary at Dow, Lohnes & Albertson, PLLC, do hereby certify that on this 25th day of January, 1999, a copy of the foregoing "Comments of Nextel Communications, Inc." was sent by hand delivery to the following:

William E. Kennard, Chairman
Federal Communications Commission
445 12th Street, S.W., 8th Floor
Washington, D.C. 20024

Magalie R. Salas, Esquire
Secretary
Federal Communications Commission
445 12th Street, S.W., 8th Floor
Washington, D.C. 20024

Harold Furchtgott-Roth, Commissioner
Federal Communications Commission
445 12th Street, S.W., 8th Floor
Washington, D.C. 20024

Michael Powell, Commissioner
Federal Communications Commission
445 12th Street, S.W., 8th Floor
Washington, D.C. 20024

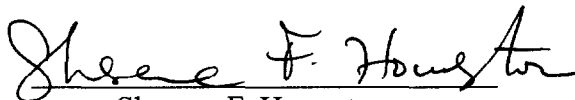
Gloria Tristani, Commissioner
Federal Communications Commission
445 12th Street, S.W., 8th Floor
Washington, D.C. 20024

Susan Ness, Commissioner
Federal Communications Commission
445 12th Street, S.W., 8th Floor
Washington, D.C. 20024

Ms. Sheryl Todd
Accounting Policy Division
Federal Communications Commission
8th Floor
2100 M Street, N.W.
Washington, D.C. 20024

Ms. Judy Boley
Federal Communications Commission
Room 234
1919 M Street, N.W.
Washington, D.C. 20554

ITS
1231 20th Street, N.W.
Washington, D.C. 20036


Sherene F. Howerton